No. 80-930

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BLUE SHIELD OF VIRGINIA

and

BLUE SHIELD OF SOUTHWESTERN VIRGINIA,

Petitioners,

vs.

VIRGINIA ACADEMY OF CLINICAL PSYCHOLOGISTS

and

ROBERT J. RESNICK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

Case *Page*

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 4

Statute

McCarran-Ferguson Act, 15 U.S.C. §§1011 to 1015 3,4

Rules

Supreme Court Rule 22.5 1

Supreme Court Rule 28.1 1

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Pursuant to Rule 22.5 of the Rules of the Supreme Court, Petitioners respectfully submit this reply brief in support of their Petition for Writ of Certiorari. The listing required under Rule 28.1 of the Rules of the Supreme Court is included in the Petition for Writ of Certiorari at footnote 2.

(A) The Claims Policy Was an Expansion of Coverage Under the Plans' Contracts with Their Subscribers

In its brief in opposition, VACP argues that the claims policy adopted by the Richmond Plan in 1972 "did not represent an expansion of coverage," because, according to VACP, the policy of the Richmond Plan even before 1972 was to pay psychologists directly for services to its subscribers.[1] VACP is mistaken. The district court found as follows:

> [The Richmond Plan] had been inconsistent in its policy during the 1960's and early 1970's in regard to payment of clinical psychologists. There is evidence that clinical psychologists had been paid for services independently rendered and yet it is not clear that this was company policy. *Instead it appears that it resulted from a lack of company policy.*[2]

Thus, before 1972 the Richmond Plan had no policy regarding payments to psychologists and certainly no policy to pay psychologists for services to subscribers. The Fourth Circuit did not disturb this finding of fact.

Before 1972 the contract between the Richmond Plan and its subscribers by its terms *did not cover* services rendered by psychologists. The contract covered only "medically necessary services . . . performed or prescribed by a Physician."[3] Since psychologists are not physicians, treat-

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[1]Brief in opposition at 3.

[2]469 F. Supp. at 558 (Appendix at A13-14) (emphasis added). The memorandum from the record in this case that VACP attached to its brief in opposition as Appendix A was written four years after the claims policy was adopted and is flatly contrary to the factual finding of the district court quoted above, which was made on the basis of the record taken as a whole.

[3]Richmond Plan Exhibit 296 (Group Major Medical Service Certificate -A)

ment by psychologists was outside the coverage of the Richmond Plan's contract. The adoption of the claims policy in 1972 meant that the Richmond Plan would pay for psychologists' services under its contract. This was an expansion of the services covered by the contract as well as an increase in the risks accepted by the Richmond Plan.

VACP's argument that the claims policy is not an expansion of coverage does not even apply to the Roanoke Plan. From 1945 when the Roanoke Plan was organized until at least 1974 the Roanoke Plan's contract covered only medical services performed by a physician, and therefore did not cover psychologists' services. However, since 1945 the Roanoke Plan has paid for psychologists' services where a physician refers the patient to the psychologist, supervises the treatment and submits the bill to the Plan. Thus, the Roanoke Plan never paid psychologists directly, and VACP's argument that the claims policy was not an expansion of coverage does not reach the Roanoke Plan.

(B) The Fourth Circuit Did Not Reach the Question Whether the Claims Policy Was a Boycott Within the Meaning of McCarran-Ferguson Act

VACP contends that the judgment below would be unchanged even if this Court holds that the claims policy is part of "the business of insurance" within the meaning of the McCarran-Ferguson Act because the Fourth Circuit allegedly found the claims policy to be a "boycott" outside the scope of McCarran-Ferguson protection.[4]

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[4]Brief in opposition at n. 18.

Again VACP is clearly in error. The Fourth Circuit did not hold that the claims policy was a boycott in the context of the McCarran-Ferguson Act.[5] For this reason, a reversal by this Court of the Fourth Circuit's holding that the claims policy is not "the business of insurance" would reverse the judgment below.

(C) The Plans' Good Faith Exercise of Civil Rights Guaranteed by the First Amendment is Fully Protected by the Noerr-Pennington Doctrine

In this case the Plans exercised their civil rights under the First Amendment by refusing to obey a state statute that they believed — correctly — to be unconstitutional. The Plans acted openly and in good faith.[6] Their purpose in refusing to obey the statute, as confirmed by the Fourth Circuit, was "to provoke a judicial resolution" of the statute's validity.

VACP seeks to distinguish the cases cited by the Plans by claiming that the actions of the defendants in those cases were "motivated entirely by a desire to advance some political goal" as opposed to the allegedly anticompetitive objectives of the Plans' civil disobedience.[7] The *Noerr-Pennington* doctrine draws no such distinction. Indeed, in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*[8] this Court acknowledged that the "sole

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[5]624 F.2d at 483 (Appendix at A43). Furthermore, in its discussion of the restraint of trade issue the Fourth Circuit did not expressly find the claims policy to be a boycott. 624 F.2d at 484 (Appendix at A46).

[6]*See* Petition for Writ of Certiorari at 15 and in particular the stipulation between counsel attached to the Writ of Certiorari as Appendix F.

[7]Brief in opposition at 21.

[8]365 U.S. 127, 138-139 (1961).

purpose" of defendants' lobbying efforts was to destroy competition from truck freight carriers. Accordingly, even if the Plans' interests in disobeying the Virginia direct payment statute had not been wholly political, their open and good faith[9] — and ultimately successful — attempt to "provoke a judicial resolution" of the statute's unconstitutionality is clearly First Amendment activity that falls within the *Noerr-Pennington* doctrine.

Respectfully submitted,

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[9]Contrary to VACP's suggestion, brief in opposition at n. 27, the Fourth Circuit unequivocally held that the Plans' conduct was not within the "sham" exception to the *Noerr-Pennington* doctrine. 624 F.2d at 482 n. 9 (Appendix at A41).